SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

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# No. 891

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CECIL McKOWN,

*Petitioner,*

vs.

STATE OF FLORIDA

*Respondent.*

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## BRIEF IN SUPPORT OF PETITION

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The petitioner seeks a review of the judgment of the Supreme Court of Florida denying a petition for a writ of certiorari (and denying a rehearing on such petition) to review a judgment of the Circuit Court of Polk County, Florida, affirming on appeal a judgment and sentence of the Criminal Court of Record of the same county, finding the petitioner guilty of a charge that he "did unlawfully keep and possess intoxicating liquors in Polk County, Florida, which county had voted against the sale of such intoxicating liquors, wines or beer, with intent to sell and dispose of them unlawfully", a misdemeanor under Florida Statutes 568.05.

The judgment of the Criminal Court of Record is to be found on page 105 of the transcript. The judgments of the Supreme Court of Florida, on the petition for the writ of certiorari and on the petition for a rehearing, were ren-

dered without decision and have not yet been officially reported, but appear on pages 124 and 127, respectively, of the transcript of record.

**Grounds on Which Jurisdiction of the Court Is Invoked**

The writ of certiorari is sought pursuant to authority of paragraph 344(b) of Title 28 U. S. C. A. (Judicial Code, Section 237, amended.)

The ground for the petition is that the State court has decided a Federal question of substance in a way not in accord with the applicable decisions of this Court. Specifically:

1. The rule of the case of *Carroll* v. *U. S.*, 267 U. S. 132, which has been adopted in Florida (F. S. 933.19) as the statute law applicable to searches and seizures and as to admissibility of evidence, despite the unequivocal holding that

> "the guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of the government, as recognizing a necessary difference between a search of a store, dwelling house, or other structure in respect of which a proper official warrant readily may be obtained and a search of a ship, motor boat, wagon, or automobile for contraband goods, where it is not practicable to secure a warrant."

(and which may be searched without a warrant if probable cause therefor can be shown) was construed and applied by the state court as permitting even the search of a dwelling house or other structure, upon probable cause alone, without the necessary warrant. The offense charged was only a misdemeanor, and the arresting officer had no authority to arrest for a misdemeanor not committed in his presence until he had secured a proper warrant.

2. Despite the adoption by statute of State of Florida of the rule of the *Carroll* case, relating to admissibility of evidence, and notwithstanding the adoption by that state in

*Gildrie* v. *State,* 94 Fla. 134,

of the same rules as to the inadmissibility of illegally obtained evidence that are applied by this Court, the state court has nevertheless held admissible evidence obtained by an illegal search of private premises, made without a warrant and not as an incident to a lawful arrest. Possession of liquor, even in a county which has voted against the sale thereof, is not unlawful in Florida, under the rule of

*Ex parte Francis,* 76 Fla. 304,

and subsequent cases.

3. The state court, by permitting the introduction of evidence obtained by an illegal search of private premises, condemned under the rule

*Amos* v. *U. S.,* 269 U. S. 20,

has, under the rule of

*Agnello* v. *U. S.,* 269 U. S. 20,

violated the petitioner's rights against self intimidation. While the last case was decided under the Fifth Amendment, that being a Federal prosecution, it would seem equally abhorrent to the due process clause of the Fourteenth Amendment in a prosecution in the State courts.

These are the grounds on which this Court's jurisdiction is invoked to review the judgment of the Supreme Court of Florida.

## Statement of Case

Information (R. 1) was filed against petitioner in the Criminal Court of Record of Polk County, Florida, charg-

ing that he "did unlawfully keep and possess intoxicating liquors in Polk County, Florida, which county had voted against the sale of such intoxicating liquors, wines or beer, with intent to sell and dispose of them unlawfully", under F. S. 568.05, prescribing that "any person • • • in any county that has voted against the sale of intoxicating liquors, wines or beer, • • • who keeps or possesses in any such county any intoxicating liquors, wines or beer with intent to sell or dispose of same unlawfully • • • shall, for each such offense, upon conviction, be punished," etc.

At the outset of the trial petitioner moved (R. 2) the court to suppress certain evidence. The principal witness for the State on this motion was N. R. Hankins, the deputy sheriff who had arrested petitioner and seized the liquor. Hankin's testimony (R. 17-23, 25-26, 35-36) briefly stated, amounted only to this: at eleven or twelve o'clock at night this deputy received information from a disgruntled employee of petitioner that petitioner and others had unloaded a semi-trailer truck load of whiskey at a certain dwelling which it was later shown (R. 27-28) had been leased to petitioner. The deputy drove up, went upon the premises, and saw the cases stacked up in the yard, inside of a thick hedge, with the word "whiskey" stenciled on them. He first testified that he "certainly couldn't read the writing before I stopped and went in" (R. 22). Petitioner told the deputy he had bought and paid for the whiskey, and that it belonged to him. The deputy then arrested petitioner and seized the whiskey. He had no warrant, either for search or arrest (R. 19). Liquor found inside the house was similarly seized (R. 24).

The motion to suppress was denied (R. 40). At the trial, where the evidence amounted to little more than that produced on the motion to suppress, the liquor so seized

was admitted in evidence over petitioner's objection (R. 74). A verdict of guilty was returned (R. 101) and a motion for a new trial denied (R. 101-102). Finally, judgment and sentence of the court were entered against petitioner (R. 105), and the liquor was ordered confiscated (R. 105).

## Argument

The skeleton of the petitioner's argument is as follows:

The question of the legality of the search and seizure here should be decided by construction of the case of *Carroll* v. *U. S., supra,* the principles of which "construing the Fourth Amendment to the Constitution of the United States, are adopted as the statute law of the State of Florida applicable to searches and seizures • • • made by any duly authorized and constituted bonded officer of this State exercising police authority" (F. S. 933.19). The same statute also provided "the same rules as to admissibility of evidence • • • as were laid down in said case • • • shall apply to and govern the rights, duties and liabilities of officers and citizens in the State of Florida under the like provisions of the Florida constitution relating to searches and seizures."

The construction of this decision is of course a Federal question, but the construction placed upon that decision by the State courts below is certainly far afield from the obvious intention of this Court.

It should be noted here that Florida has also adopted generally the rule applied in the Federal courts forbidding the introduction of evidence illegally seized or evidence obtained by an unauthorized search.

*Gildrie* v. *State, supra;*
*Thurman* v. *State,* 116 Fla. 426;
*Solomon* v. *State,* 115 Fla. 310.

The distinction was clearly drawn in the *Carroll* case, that

> "The guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed practically since the beginning of the government, as recognizing a necessary difference between a search of a store, dwelling house, or other structure in respect of which a proper official warrant readily may be obtained and a search of a ship, motor boat, wagon, or automobile for contraband goods, where it is not practicable to secure a warrant, because the vehicle can be quickly moved."

Yet the court below ignored this line of demarkation, and held that a dwelling house was likewise subject to a search upon probable cause, without any warrant, contrary to the language quoted and contrary to the rule recognized in *Agnello* v. *U. S., supra,* and *Brock* v. *U. S.,* 12 Fed. (2d) 370 (C. C. A. 8th), that belief, however well founded, that an article sought is concealed in a dwelling house, furnishes no justification for a search of that place without a warrant.

The case below is not even as strong as the *Agnello* case, because in Florida possession, ownership and private transportation of intoxicating liquor is perfectly lawful, even in a county which has "voted against the sale thereof".

*Ex parte Francis, supra;*
*State ex rel. Hoffman* v. *Powell,* 118 Fla. 296.

The jury was so charged at petitioner's trial (R. 111).

Furthermore, the possession of liquor in a private dwelling is not *prima facie* evidence that it is kept there for an unlawful purpose. The citizen cannot be called upon to explain his possession of the liquor in a private dwelling.

*Castro* v. *U. S.,* 23 Fed. (2d) 263 (C. C. A. 1st);
*Connelly* v. *U. S.,* 275 Fed. 509 (N. D. N. Y.).

Hence it cannot be argued that there was any crime committed in the presence of the arresting officer. In Florida, as generally, a law enforcement officer can without a warrant arrest for a misdemeanor only when the misdemeanor has been committed in his presence. F. S. 901.15 No overt act was committed in the presence of the deputy from which an illegal intention could have been presumed. The possession itself was lawful, and called for no explanation from petitioner. Possibly the facts justified the issuance of a warrant, for which the officers had ample time to apply, but there was certainly no misdemeanor committed in the presence of the deputy.

"Only direct, personal knowledge, through his hearing, sight, or other sense, of the commission of the crime by the accused" will justify the law enforcement officer in searching and seizing, or in arresting the accused without a warrant. Mere suspicion is not sufficient.

*Brock* v. *U. S., supra;*
*Peru* v. *U. S.,* 4 Fed. (2d) 881 (C. C. A. 8th).

The fact that odors of mash, or other odors evidencing the illegal manufacture of whiskey, emanate from a barn, garage, or other private building and are detected by the law enforcement officer does not permit him to enter the building without a warrant, as there is no crime committed in his presence.

*Giusti* v. *U. S.,* 4 Fed. (2d) 703 (C. C. A. 5th);
*Temperani* v. *U. S.,* 299 Fed. 365 (C. C. A. 9th);
*U. S.* v. *Di Corvo,* 37 Fed. (2d) 124 (D. Conn.).

The instant case is like that of *U. S.* v. *Codde,* 22 Fed. (2d) 690 (E. D. Mich), where prohibition agents scaled a back fence and saw contraband liquor through an open door; the evidence seized upon their entry into the building without a warrant was held inadmissible.

Hence petitioner contends that the rulings of this Court on a Federal question of importance have not been followed by the State court, and that petitioner has not been accorded his constitutional guaranty of due process of law as insured by the Fourteenth Amendment.

It is therefore respectfully submitted that the petitioner is entitled to some relief at the hands of this Court.

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Dated February 21st, 1946.